PP

v.

MOHD ROSLAN DESA & ANOR

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
ZALEHA ZAHARI JCA
SURIYADI HALIM OMAR JCA
[CRIMINAL APPEAL NO: K-05-47-2005]
25 MARCH 2009

CRIMINAL LAW: *Penal Code - Sections 302, 34 - Murder - Common intention - Acquittal and discharge of respondents, appeal against - Prima facie case - Admission of trial records of another case involving 1st respondent - Similarities of fact - Positive probative value*

CRIMINAL PROCEDURE: *Prosecution - Prima facie case - Failure to prove - Murder and common intention - Acquittal and discharge of respondents, appeal against - Circumstantial evidence - Admission of trial records of another case involving 1st respondent - Similarities of fact - Positive probative value*

EVIDENCE: *Similar facts - When admissible - Trial records of another case involving 1st respondent - Whether revealed features of such striking similarity as to be of positive probative value - Surrounding circumstances*

EVIDENCE: *Admissibility - Similar facts - Trial records of another case involving 1st respondent - Whether revealed features of such striking similarity as to be of positive probative value - Surrounding circumstances*

The respondents were charged with intentionally killing the deceased, a Chinese female, an offence punishable under s. 302 of the Penal Code ('Code') read together with s. 34 of the Code. The prosecution's case against the respondents rested on circumstantial evidence, and its attempt to admit the trial records of another case involving the 1st respondent ('ID39') was not allowed by the trial judge. The prosecution's failure to prove "common intention" was significant. The trial judge ruled that the probability of either one of the respondents being the person who killed the deceased was insufficient for the court to conclude that the respondents were the persons who killed the deceased. He then held that the prosecution had failed to prove a *prima facie* case against both the respondents, and acquitted and discharged

A them. The prosecution appealed, focussing on the judge's decision to not admit ID39, the trial records involving the 1st respondent to which he had pleaded guilty for an offence under s. 304 of the Code *ie*, that of causing the death of a Chinese female on 11 December 1998. The prosecution submitted that the earlier
B case had the following similarities to the facts of this case. The 1st respondent had in that earlier case admitted to puncturing the tyre of his victim's car; that on the pretext of helping his victim, to having robbed the victim and thereafter driving away in the victim's car. According to the facts in ID39, in the course of
C committing the robbery the victim was killed. The prosecution submitted that ID39 was relevant and admissible pursuant to ss. 14 and 15 of the Evidence Act 1950 to show *"modus operandi"*.

D **Held (dismissing the appeal)**
Per Zaleha Zahari JCA delivering the judgment of the court:

(1) The evidence that the prosecution sought to adduce as "similar fact" did not reveal features of such striking similarity
E as to be of positive probative value. The similarities raised related to the surrounding circumstances. Causing the victim's tyre to deflate and subsequently rendering assistance by changing the affected tyre were features that could not, by themselves, lead to the conclusion that it was the 1st
F respondent who committed the offence of which he stood charged. The judge was, in the circumstances of this case, clearly right in taking into consideration the fact that possession of items belonging to the deceased and the manner in which the 1st respondent obtained such items had not
G been proved, as well as the absence of evidence as to how the deceased was killed. The evidence merely invited the court to infer that it was the 1st respondent who stole the deceased's car after the deceased was killed, or, the probability that a third party had sold the deceased's car to
H the 1st respondent. The failure to prove common intention was fatal. (para 12)

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden telah dituduh membunuh dengan sengaja si
I mati, seorang perempuan Cina, yang merupakan suatu kesalahan yang boleh dihukum di bawah s. 302 Kanun Keseksaan ('Kanun') dibaca bersama-sama dengan s. 34 Kanun. Kes pendakwaan

terhadap responden-responden bergantung kepada keterangan ikut keadaan, dan percubaannya untuk memasukkan rekod-rekod perbicaraan suatu kes lain yang melibatkan responden pertama ('ID39') tidak dibenarkan oleh hakim perbicaraan. Kegagalan pendakwaan untuk membuktikan "niat bersama" adalah penting. Hakim perbicaraan memutuskan bahawa kemungkinan mana-mana seorang daripada kedua-dua responden-responden ialah orang yang membunuh si mati tidak mencukupi bagi mahkamah memutuskan bahawa responden-responden telah membunuh si mati. Beliau kemudian mendapati bahawa pendakwaan telah gagal membuktikan kes *prima facie* terhadap kedua-dua responden-responden, dan telah membebaskan dan melepaskan mereka. Pendakwaan merayu, dan memfokus atas keputusan hakim untuk tidak membenarkan ID39, rekod-rekod perbicaraan yang melibatkan responden pertama di mana beliau telah memplid bersalah atas satu kesalahan di bawah s. 304 Kanun, iaitu, menyebabkan kematian seorang perempuan Cina pada 11 Disember 1998. Pendakwaan menghujah bahawa kes terdahulu itu mempunyai persamaan-persamaan dengan fakta-fakta kes semasa. Responden pertama telah dalam kes terdahulu mengaku memancitkan tayar kereta mangsanya; bahawa atas preteks menolong mangsanya, beliau telah merompak mangsanya dan selepas itu memandu dari situ dalam kereta mangsa. Mengikut fakta-fakta dalam ID39, semasa melakukan perompakan itu mangsa telah dibunuh. Pendakwaan menghujah bahawa ID39 adalah relevan dan boleh diterima mengikut ss. 14 dan 15 Akta Keterangan 1950 untuk menunjukkan *"modus operandi"*.

Diputuskan (menolak rayuan)
Oleh Zaleha Zahari HMR menyampaikan penghakiman mahkamah:

(1) Keterangan yang pendakwaan cuba mengemukakan sebagai "fakta serupa" tidak menampakkan ciri-ciri yang mempunyai keserupaan yang sungguh ketara sehingga menjadikannya mempunyai nilai probatif positif. Keserupaan yang telah dibangkitkan berkaitan dengan halkeadaan sekeliling. Menyebabkan tayar mangsa untuk pancit dan selepas itu memberi pertolongan dengan menukar tayar itu merupakan ciri-ciri yang tidak boleh, secara sendirinya, membawa kepada kesimpulan bahawa ia adalah responden pertama yang telah melakukan kesalahan yang beliau telah dituduh dengan. Hakim, dalam halkeadaan kes semasa, jelas betul dalam menimbangkan fakta bahawa milikan item-item kepunyaan si mati dan cara

A responden pertama memperolehi item-item sebegitu telah tidak dibuktikan, di samping ketiadaan keterangan mengenai bagaimana si mati telah dibunuh. Keterangan hanya meminta mahkamah untuk membuat inferens bahawa responden pertamalah yang telah mencuri kereta si mati selepas si mati
B telah dibunuh, atau, kemungkinan bahawa satu pihak ketiga telah menjual kereta si mati kepada responden pertama. Kegagalan untuk membuktikan niat bersama ialah fatal.

Case(s) referred to:
C *Junaidi Abdullah v. PP [1993] 4 CLJ 201 SC* ***(refd)***
Makin v. Attorney General for New South Wales [1894] AC 57 ***(refd)***
R v. Raju & Ors v. R [1953] 19 MLJ 21 ***(refd)***
Reg v. Boardman [1975] AC 421 ***(refd)***

Legislation referred to:
D Evidence Act 1950, ss. 14, 15
Penal Code, ss. 34, 302, 304

For the prosecution - Nurulhuda Mohd Noor DPP
For the respondents - Dr Hj Mohd Radzuan Ibrahim (Jamal Abas with him); M/s Radzuan Ibrahim & Co

E

[Appeal from High Court, Alor Star; Criminal Trial No: 45-21-2001]

Reported by Suresh Nathan

F

JUDGMENT

Zaleha Zahari JCA:

[1] The High Court Judge's finding at the close of the
G prosecution's case was that the prosecution had failed to prove a *prima facie* case against both of the respondents and acquitted and discharged them. The unanimous decision of this Court was to dismiss this appeal and to affirm the decision of the High Court Judge for the following reasons.

H

[2] The charge preferred against the respondents was as follows:

> Bahawa kamu bersama-sama di antara 23.12.1998 jam lebih kurang 9.00 MALAM hingga 24.12.1998 jam lebih kurang 5 petang di antara Jalan Solok Sembilan, Seberang Jaya,
I Butterworth, Pulau Pinang hingga ke suatu kawasan parit di Kampung Padang Buluh, Tikam Batu, Kuala Muda, Kedah Darul

Aman telah dengan sengaja membunuh seorang perempuan Ooi Yean Wah K.P. No. 741119-07-5340 dengan itu kamu telah melakukan kesalahan yang boleh di hukum dibawah Seksyen 302 Kanun Keseksaan yang dibaca bersama-sama dengan seksyen 34 Kanun Keseksaan.

[3] The fact that the person named in the charge, Ooi Yean Wah ("the deceased"), had died has been proved by the evidence of the father and mother of the deceased (SP16 and SP17 respectively). There is also the testimony of Dr. Bhupinder Singh, the Consultant Forensic Pathologist (SP23) who conducted the post mortem, who testified that the cause of death of the deceased was fracture of the 2nd and 3rd cervical spine. He also testified that there was also a penetrating injury to left iliac crest of 2cm depth.

[4] The prosecution's case against the respondents rests on circumstantial evidence. The prosecution's attempt to admit the trial records of another case involving the 1st respondent (ID39) was not allowed by the trial judge. The reasoning of the trial judge in arriving at the conclusions which he did may be summarized as follows: Possession of items belonging to the deceased and the manner of how the 1st respondent obtained such items had not been proved. The absence of motive, as well as the absence of any evidence as to how the deceased was killed were factors taken into consideration. Based on the evidence before him, they merely invited the court to infer that it was the 1st respondent who stole the deceased's car after she was killed, or, the probability that a third party had sold the deceased's car to the 1st respondent. The prosecution's failure to prove "common intention" was significant. The trial judge ruled that the probability of either one of the respondents being the person who killed the deceased was insufficient for the court to conclude that the respondents were the persons who killed the deceased. He then concluded that the prosecution had failed to prove a *prima facie* case against the respondents and acquitted and discharged them.

[5] The DPP's arguments in this appeal focused on the High Court Judge's decision in not admitting ID39, the trial records involving the 1st respondent to which he had pleaded guilty for an offence under s. 304 of the Penal Code, ie, that of causing the death of a female Chinese on 11 December 1998. The DPP submitted that earlier case had the following similarities to the

facts of this case. The 1st respondent had in that earlier case admitted to puncturing the tyre of his victim's car; that on the pretext of helping his victim, to having robbed the victim, and thereafter in driving away in the victim's car. According to the facts in ID39, in the course of committing the robbery, the victim was killed.

[6] The DPP submitted ID39 was relevant and admissible pursuant to s. 14 and 15 of the Evidence Act 1950, to show 'modus operandi'. She submitted that had the trial judge admitted ID39, the judge should then have made the following inferences. That this was not just an ordinary case of a theft of a motor vehicle. That the person who took the deceased car was the person who had killed her. The injuries inflicted on the deceased was by the use a weapon, such as a knife. On the facts of this case, there is the testimony of SP11 that the 1st respondent had used a knife in puncturing the tyre of the deceased's car. The DPP submitted the trial judge should have then further inferred that the person who committed these acts was the 1st respondent as he had custody of the deceased's car on 24 December 1998, soon after her death. Also significant, was the evidence the 1st respondent meeting SP6 to make a false number plate to replace the existing number plate of the deceased's car.

[7] The tests which have to be applied on the correctness of the decision of the High Court Judge in not admitting ID 39 in this case as laid out by the authorities cited before us are clear: When a person is charged with a criminal offence, evidence that he had on other occasions been guilty of behaviour indicating a criminal disposition is ordinarily inadmissible. It is excluded because it is likely to be regarded as proving too much, and is for that reason likely to proceed upon prejudice rather than proof. In discussing s. 14 and 15 of the Evidence Act 1950, the Malaysian courts have relied on the Privy Council's decision of *Makin v. Attorney General for New South Wales* [1894] AC 57, 65. In *Makin*, the issue before the Privy Council was whether it was wrong to admit evidence of the finding of other bodies other than the body of the child alleged to be Horace Amber Murray (deceased). The Privy Council laid down the propositions in relation to the application of "similar fact" evidence as follows:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.

The Privy Council further states:

> On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other.

[8] In *Reg. v Boardman* [1975] AC 421, 461 Lord Salmon states:

> … evidence against an accused which tends only to show that he is a man of bad character with a disposition to commit crimes, even the crime with which he is charged, is inadmissible and deemed to be irrelevant in English law … To admit such evidence would be unjust and would offend our concept of a fair trial to which we hold that everyone is entitled. Nevertheless, if there is some other evidence which may show that an accused is guilty of the crime with which he is charged, such evidence is admissible against him, notwithstanding that it may also reveal his bad character and disposition to commit crime.

[9] In *R v. Raju & Ors v. R* [1953] 19 MLJ 21, 22 Spenser Wilkinson J ruled:

> Generally speaking the evidence of similar facts may be relevant for the following purposes, though this list may not be exhaustive:
>
> 1. To negative accident;
> 2. To prove identity;
> 3. Where *mens rea* is the gist of the offence, to prove intention; and
> 4. To rebut a defence which would otherwise be open to the accused.

> In my opinion it is of the greatest importance when evidence of this kind is tendered that the prosecution should tender it for a specific purpose and that, if it is admitted, it should be made quite clear for what purpose it is admitted.

[10] The propositions laid down in *Makin* and *Boardman* has been recognized by the Malaysian courts. In *Junaidi bin Abdullah v. PP* [1993] 4 CLJ 201 the Supreme Court relied on Lord Morris's judgment in *Boardman* and held:

> (4) Where the purpose of adducing evidence of similar facts or similar offences was justifiable on the ground of relevancy and necessity to rebut any defence which would otherwise have been open to the accused (in addition to those under ss. 14 and 15 of the Evidence Act 1950), evidence of bad character was admissible in evidence, provided that the probative value of such evidence outweighed its prejudicial effect. There must be a real anticipated defence to be rebutted and not merely crediting the accused with a fancy defence. Here, the evidence of the physical possession of the revolver by another person during the earlier robbery was vital to the defence and relevant under s. 11 of the Evidence Act 1950 to cast a reasonable doubt on the prosecution case that the accused was in possession of the revolver at the time of the arrest. Therefore, the prosecution was entitled to adduce evidence to rebut such a defence.

[11] The issue in this case is whether the similarities relied upon by the prosecution were unique or striking to reveal an underlying link between the matters with which it deals, and the allegations against the respondents upon the charge under consideration such that common sense makes it inexplicable on the basis of coincidence. This task is ultimately one of judgment. It must go beyond showing a tendency to commit crimes of this kind. It must be positively probative in regard to the crime now charged.

[12] We are in agreement with the trial judge's assessment that properly considered the evidence which the prosecution seeks to adduce as "similar fact" did not reveal features of such striking similarity as to be of positive probative value. The similarities raised relates to the surrounding circumstances. Causing the victim's tyre to deflate, of subsequently rendering assistance by changing the affected tyre, these features by itself in our view cannot by themselves lead to the conclusion that it was the 1st respondent who committed the offence of which he now stands charged. The learned judge was clearly in the circumstances of this case right in

taking into consideration the fact that possession of items belonging to the deceased and the manner of how the 1st respondent obtained such items had not been proved, as well as the absence of evidence as to how the deceased was killed. We agree with his finding that the evidence adduced merely invited the court to infer that it was the 1st respondent who stole the deceased's car after the deceased was killed, or, the probability that a third party had sold the deceased's car to the 1st respondent. We agree that the failure to prove common intention was fatal.

[13] In these circumstances the appeal was dismissed. The High Court Judge's decision in acquitting and discharging the respondents was affirmed.